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No. 80-1745

IN THE

Supreme Court of the United States

October Term, 1980

F. W. WOOLWORTH CO., *Appellant,*

v.

TAXATION AND REVENUE DEPARTMENT OF THE STATE OF NEW MEXICO, *Appellee.*

On Appeal from the Supreme Court of New Mexico

BRIEF OF AMICUS CURIAE MULTISTATE TAX COMMISSION IN SUPPORT OF APPELLEE'S MOTION TO DISMISS OR AFFIRM

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INTRODUCTORY STATEMENT

This brief is submitted by the Multistate Tax Commission in support of the Appellee's Motion to Dismiss or Affirm. Both parties of this proceeding have consented to the filing of this brief.[1]

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[1] Originals of the consent letters have been filed with the Clerk of Court.

STATEMENT OF INTEREST

The Multistate Tax Commission (hereinafter referred to as the Commission) is the official administrative agency of the Multistate Tax Compact (hereinafter referred to as the Compact) entered into currently by 19 states as full members, including New Mexico, and by 12 states as associate members.[2]

The purposes of the Compact are to:

1. Facilitate proper determination of state and local tax liability of multistate taxpayers, including the equitable apportionment of tax bases and settlement of apportionment disputes.

2. Promote uniformity or compatability in significant components of tax systems.

3. Facilitate taxpayer convenience and compliance in the filing of tax returns and in other phases of tax administration.

4. Avoid duplicate taxation.[3]

In fulfillment of these objectives, in the area of state income taxation of multistate-multinational business, Article IV of the

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[2] The current regular members are the states of Alaska, Arkansas, California, Colorado, Hawaii, Idaho, Kansas, Michigan, Missouri, Montana, Nebraska, New Mexico, Nevada, North Dakota, Oregon, South Dakota, Texas, Utah and Washington. The associate members are the states of Alabama, Arizona, Georgia, Louisiana, Maryland, Massachusetts, Minnesota, New Jersey, Ohio, Pennsylvania, Tennessee, and West Virginia. (Ninth Annual Report, Multistate Tax Commission, June 30, 1976).

[3] The constitutionality of the Compact was upheld by the United States Supreme Court in *U.S. Steel, et al. v. Multistate Tax Commission, et al.*, 434 U.S. 452 (1978), affirming 417 F.Supp. 795 (S.D.N.Y. 1976). The Court there noted that the Compact ". . . symbolized the recognition that, as applied to multistate businesses, traditional state tax administration was inefficient and costly to both state and taxpayer."

Compact sets forth the provisions of the Uniform Division of Income for Tax Purposes Act (UDITPA).[4] The purpose of UDITPA is to provide for the uniform allocation and apportionment of income for state income tax purposes by those states that have adopted it. It has been adopted by a great majority of the income tax states.[5] It applies to all classes of taxpayers (individuals, partnerships, etc.) except financial institutions and public utilities. It provides for the specific allocation or apportionment of all the income of all the included taxpayers except the personal service income of individuals. UDITPA apportions "business income" in accordance with the well-recognized three-factor apportionment formula of property, payroll and sales. "Nonbusiness income" is specifically allocated as provided for therein.[6]

Pursuant to its authority under Article VII of the Compact, the Commission approved revised uniform allocation and apportionment regulations on February 21, 1973, which implement UDITPA. New Mexico and approximately 17 other states have adopted these regulations substantially in the form as adopted

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[4] UDITPA was promulgated by the National Conference of Commissioners on Uniform State Laws in 1957. Uniform Laws Annotated, Vol. 9A, p. 448, *et seq.*

[5] 11th Annual Report of the Multistate Tax Commission, 1977-1978, App. B, p. 28.

[6] Section 1(a) of UDITPA defines "business income" as:

> Income arising from transactions and activities in the regular course of the taxpayer's trade or business and includes income from tangible and intangible property if the acquisition, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations.

Section 1(e) defines nonbusiness income subject to specific allocation as "all income other than business income."

by the Commission.[7] These regulations embody an interpretation of the language of UDITPA.

It is important that the UDITPA provisions be interpreted to carry out the purpose of the 29 states, including New Mexico, in adopting the uniform allocation and apportionment rules contained therein. This purpose is to provide for uniformity and full accountability (without duplication) in the division of income for state income tax purposes by workable and rational division of income rules.[8]

The Commission and its member states are concerned with the proposition advanced by Woolworth that, under the United States Constitution, dividends, and presumably other income from business-related intangible property, must be arbitrarily assigned, for state income tax attribution purposes, to the commercial domicile or to the location of the payors of the income, rather than to where the taxpayer utilizes these intangible properties in the conduct of its unitary business activities, as required by a reasonable interpretation and application of the UDITPA definition of "business income".

More particularly, in the instant matter, the Commission and its member states are concerned with the novel proposition, advanced by Woolworth, that *Mobil Oil Corp. v. Comm'r. of Taxes of Vermont*, 445 U.S. 425 (1980), supports the proposition that only income from investments in stock of payors, which conduct a unitary business with a payee taxpayer for

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[7] Results of a survey on the Uniformity of State Laws by the State of Indiana dated February 15, 1977.

[8] Prefatory note to UDITPA, Uniform Laws Annotated, Vol. 9A, p. 448; *GTE Automatic Electric v. Allpin*, 68 Ill.2d 326, 369 N.E.2d 941 (1977) and Pierce, "The Uniform Division of Income for State Tax Purposes," 35 Taxes 747 at 748 and 749 (1957).

"combined reporting" purposes, is apportionable; and, if apportionable, must, as a matter of constitutional law, be apportioned on the basis of the business activities of the payor corporations. The acceptance of this argument would require this Court to declare the attribution provisions of UDITPA unconstitutional even though UDITPA requires apportionment of only the unitary income of a unitary business which is carried on in part in the taxing state. The purpose of this brief is to demonstrate that *Mobil* and other controlling decisions of this Court preclude any such result and indicate that this Court should either dismiss this appeal for want of a substantial federal question or affirm the decision below of the New Mexico Supreme Court.

As a subsidiary matter, the Commission and member states are also concerned with Woolworth's position that the states are constitutionally precluded from defining taxable income by utilizing federal taxable income as a starting point for the purpose of state income taxes because federal taxable income is unreliable for this purpose.

COUNTER STATEMENT OF THE CASE

The Commission accepts Woolworth's Statement of the Case except it *disagrees* with Woolworth's statements pertaining to its relationship with its four subsidiaries from which it derived the dividends in question and with the Statement's omission of important facts.

Irrespective of how this relationship is described and characterized, it is important to note that there is no claim made by Woolworth that it, as a single corporate entity, did not conduct all of its own business operations as a single unitary business nor that the dividends in question did not result from stock investments to further its own business operations as a single corporate entity. In short, there is nothing in the record to establish that the dividends in question were not a part of

Woolworth's unitary business operations which it conducted in part in New Mexico for the year in question. Neither is there anything in the record to establish that the UDITPA apportionment formula, as applied to its total income from its unitary business, assigns any income to New Mexico not reasonably related to its New Mexico activities for the year in question.

The facts concerning Woolworth's relationship with these subsidiaries are set forth on pages 8a-9a of the Jurisdictional Statement. Based on these facts and its examination of the entire record, the New Mexico Supreme Court concluded:

> On the due process issue and in conformity with *Mobil*, we hold that, for income tax considerations, there is substantial evidence in this record that Woolworth was conducting a unitary business with its foreign subsidiaries and that there is a sufficient nexus between the corporation and the State of New Mexico to justify an apportioned tax on these dividends. The income is obviously related to the mutual activities of the parent and its affiliates. The control over the subsidiaries, the interdependence, the history of the relationships, the placing of the money in the general operating account, all point to functional integration and reveal an underlying unitary business for our purposes here.
>
> Juris.St., p. 19a

The fact that the foregoing findings and conclusion of the New Mexico Supreme Court is supported by the record is demonstrated by the following facts taken from the transcript of the proceedings below.

Woolworth's foreign subsidiaries, under the Woolworth name (TR 68), conduct the same type of retail operations as does Woolworth (TR 67). Woolworth's overall financing and planning included and was integrated with that of its foreign subsidiaries (TR 75-76). There was a substantial exchange of business information between Woolworth and its foreign subsidiary

corporations through a teletype communications system and travel of executive personnel of both the foreign subsidiaries and Woolworth (TR 84-86). There was a healthy exchange of information between Woolworth and its subsidiaries on a regular basis at the highest levels (TR 85-86). This was particularly true with regard to major decisions (TR 88). Any substantial borrowing of the foreign subsidiaries required approval of Woolworth (TR 76). To what extent there was a flow of goods between Woolworth and its foreign subsidiaries is not known (TR 96). However, there was some, as well as a flow of financial resources (TR 98). While the record is not clear as to the actual degree of control Woolworth's board of directors exercised over its foreign subsidiary corporations, it did oversee these operations (TR 103). Management responsibilities were given by Woolworth to its foreign subsidiaries only commensurate with the development of their abilities to act independent of Woolworth (TR 78). Also, there are interlocking directors and executive personnel between that of Woolworth and its foreign subsidiaries (TR 72, 77, 90, 93). To this end, Woolworth has an international vice-president (TR 104). Woolworth controlled major decisions and transactions of its subsidiaries (TR 74, 76). Although there is evidence in the record that there were no transfers of individuals from Woolworth to its subsidiaries in the taxable year in question (TR 105), there is no evidence that there was not substantial transfers of such personnel in other years (TR 107). The record further establishes that Woolworth made various other financial commitments to its overseas subsidiary corporations, in addition to its initial investment, in the form of loans and reinvestments (TR 107, 62, 76). The managing directors of the foreign subsidiaries and affiliates in question were selected by Woolworth (TR 81-82). The dividend policies of the subsidiary and affiliated corporations in question are determined by Woolworth (TR 83).

Thus, while the record in this cause is far from complete concerning Woolworth's business relationships with its subsidiary

corporations in question, there can be no doubt that, as a factual proposition, Woolworth had substantial unitary ties with them.[9]

THE COURT SHOULD EITHER DISMISS THIS APPEAL OR AFFIRM THE DECISION BELOW BECAUSE WOOLWORTH HAS RAISED NO SUBSTANTIAL FEDERAL QUESTION.

A. Assuming *arguendo*, that New Mexico could include in the apportionable income of the taxpayer, only the dividends from corporations which conduct a unitary business with the taxpayer, Woolworth is not entitled to have the dividends in question excluded from apportionable income because the record in this cause amply supports the finding of the Court below that Woolworth did conduct a unitary business with its foreign subsidiary corporations for the year in question.

The foregoing statement is amply supported by the record in this cause and needs no further elaboration here. Woolworth's foreign subsidiaries were created and utilized by it to conduct a functionally-integrated worldwide retail business. It utilized its resources, as a parent company, for this purpose. Under no stretch of the imagination can the operations of the subsidiaries in question be classified as discrete business enterprises disassociated for due process purposes from the business enterprise of Woolworth. Thus, however *Mobil* is construed, it supports the judgment of the Court below. Woolworth has thus raised no substantial federal question as to the apportionability of the dividends in question.

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[9] For a more complete statement of these ties for prior years, see *F. W. Woolworth Co. v. Director of Div. of Taxation*, 45 N.J. 466, 213 A.2d 1 (1965).

B. Neither *Mobil* nor any other precedent of this Court limits the apportionability of dividends to only those dividends which are received from a taxpayer which conducts a unitary business with the business of the payor corporations.

Apart from ignoring the facts which are here controlling, Woolworth argues that *Mobil* precludes the apportionment of any dividends unless the payor corporations conduct a unitary business with the payee taxpayer. It then urges this Court to take jurisdiction of this case to determine what facts are necessary to support a finding of a unitary business for this purpose.

This position of Woolworth is not supported by any rational analysis of *Mobil* or the due process or commerce clause restrictions on state taxing powers, as affirmed in *Mobil.* Dividends held apportionable in *Mobil* included minority stockholdings. This is amply demonstrated by Mobil's 10% ownership of stock in ARAMCO.

The key language in *Mobil* is the statement:

> *As these cases indicate,* the linchpin of apportionability in the field of state income taxation is the unitary business principle. *In accordance with this principle, what appellant must show,* in order to establish that its dividend income is not subject to an apportioned tax in Vermont, *is that the income was earned in the course of activities unrelated to the sale of petroleum products in that State.* (Footnote omitted; Emphasis added; 100 S.Ct. 1223 at 1232)

Further, this Court noted in *Mobil*:

> In the absence of any proof of discrete business enterprise, Vermont was entitled to conclude that the dividend income's foreign source did not destroy the requisite nexus with in-state activities.'

The language in the above quotes demonstrates that the *Mobil* court was addressing the question of the relationship of

the stock investments to the unitary business operations of the taxpayer. In fact, this is the only relevant due process question decided in *Mobil.*

This conclusion is supported by the cases relied upon in *Mobil* in support of the "linchpin of apportionability" statement: *Butler Bros. v. McColgan, supra,* 315 U.S. 501 (1942); *Ford Motor Co. v. Beauchamp,* 308 U.S. 331 (1939); *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978); *Bass, Ratcliff & Gretten, Ltd. v. State Tax Comm'n.,* 266 U.S. 271 (1924); and *Underwood Typewriter Co. v. Chamberlain,* 245 U.S. 113 (1920). All of these cases, except *Beauchamp,* were cases which upheld the apportionability of the entire net income of a single corporate entity based on the unitary operations of the single entity. *Beauchamp* upheld the apportionment of the unitary value of Ford Motor Co. to Texas for net worth franchise tax purposes against the contention that the apportioned value grossly exceeded the value of Ford's Texas assets. In all of these cases, the court sustained apportionment of the entire income or value of a single enterprise since it was not shown (1) that any of the income or value was disassociated from the taxpayer's unitary business; or (2) that the apportionment reached extraterritorial values or income.

The *Mobil* court's disposition of the commerce clause issue also refutes Woolworth's due process argument as to apportionability of stock investment income. In disposing of the commerce clause argument of Mobil, this court was concerned with the argument that dividends should be allocated exclusively to the commercial domicile. In rejecting this argument, it held that dividends are subject to apportionment

> *** when the dividends reflect income from a unitary business, part of which is conducted in other States. In that situation, the income bears relation to the benefits and privileges conferred by several states. These are circumstances in which apportionment is ordinarily the accepted method. (100 S.Ct. at 1236)

Here, there is no question that this Court was concerned with the relationship of the dividend income to the unitary business of a single corporation.

Incongruous tax results follow if the due process clause precludes the apportionability of dividends in circumstances where the commerce clause permits and indeed may require it. It is thus necessary to construe both clauses to produce a harmonious result.

When this is done, *Mobil* clearly supports the apportionment of income from intangibles if associated with the taxpayer's unitary business.

For due process purposes, the controlling question is whether stock investments, giving rise to dividends, are made in connection with or are in some way related to the unitary business of the recipient.

C. To condition the constitutionality of inclusion of income from stock investments upon a finding that the investments are in corporations which conduct a unitary business with the investor is illogical and should not be read into Mobil.

Reg. IV.1 (c) (4) of the Commission UDITPA regulations sets forth the following examples of apportionable dividend income under UDITPA:

> Example (i.): The taxpayer is engaged in a multistate manufacturing and wholesaling business. In connection with that business the taxpayer maintains special accounts to cover such items as workmen's compensation claims, etc. A portion of the moneys in those accounts is invested in interest-bearing bonds. The remainder is invested in various common stocks listed on national stock exchanges. Both the interest income and any dividends are business income.

Example (iii): The taxpayer and several unrelated corporations own all of the stock of a corporation whose business operations consist solely of acquiring and processing materials for delivery to the corporate owners. The taxpayer acquired the stock in order to obtain a source of supply of materials used in its manufacturing business. The dividends are business income.

Example (iv): The taxpayer is engaged in a multistate heavy construction business. Much of its construction work is performed for agencies of the federal government and various state governments. Under state and federal laws applicable to contracts for these agencies, a contractor must have adequate bonding capacity, as measured by the ratio of its current assets (cash and marketable securities) to current liabilities. In order to maintain an adequate bonding capacity the taxpayer holds various stocks and interest-bearing securities. Both the interest income and any dividends received are business income.

Example (v): The taxpayer receives dividends from the stock of its subsidiary or affiliate which acts as the marketing agency for products manufactured by the taxpayer. The dividends are business income.

These examples are obvious illustrations of investments in stocks made for a purpose clearly associated with the taxpayer's unitary business operations. An investment in stock for this purpose is further illustrated by the following hypothetical example:

Assume that Corporation X conducts a business which requires the use of substantial amounts of electrical energy and it desires to locate a plant in an area where the local electric utility does not have the existing capacity to furnish Corporation X with the needed energy. Assume further that Corporation X agrees with the local utility to supply it with capital to expand the

utility's electrical energy capacity and purchases a minority stock interest in the utility for this purpose.

Under this example, it is clear that the stock was acquired for an essential business purpose directly associated with the business of Corporation X. It is inconceivable, under these facts, that the dividends from this stock, which represent at least in part Corporation X's deductible energy costs, cannot be apportioned for lack of a due process connection with Corporation X's business. Under this example, in a due process constitutional sense, why should the apportionability result be any different than if Corporation X had acquired a controlling interest in the local utility or formed its own utility in which it owned a controlling interest? We can conceive no difference.

The foregoing examples are not constitutionally distinguishable from Mobil's investment in ARAMCO stock which was held apportionable in *Mobil.* In each instance, the controlling question is the relationship of the stock investments to the taxpayer's trade or business operations in the taxing state. If there is a relationship, due process is satisfied.

Obviously, apart from the unitary ties between the business of a payee corporation and that of payor corporations, there can exist a relationship between stock investments and the business of the payee corporation which is sufficient to justify the apportionment of dividend income.

The key question as to apportionability under due process limitations is: "Is the income from investments related to or made in furtherance of the unitary trade or business of the taxpayer?" Framing the due process issue in this manner does not mean that the relationship of the business of the payor to the business of the payee taxpayer is irrelevant in determining whether the income from stock investments is includable in apportionable income. It simply means that it is not controlling. A taxpayer might make a stock investment to obtain a market

for its product or for a source of supplies.[10] Such considerations are relevant, however, only to determine the relationship of an investment to the business of the taxpayer. Other considerations are equally important for this purpose.

The decisions of the Supreme Court, including those relied on in *Mobil*, support this position. See, e.g., *Adams Express, supra; Bass, Ratcliff & Gretten v. State Tax Comm'n*, 266 U.S. 271 (1924); *Butler Bros. v. McColgan*, 315 U.S. 501 (1942); *Flint v. Stone Tracy Co.*, 220 U.S. 107 (1911); *Underwood Typewriter Co. v. Chamberlain*, 245 U.S. 113 (1920); *Hans Rees' Sons, Inc. v. North Carolina*, 283 U.S. 123 (1931); *Moorman Mfg. Co. v. Bair, supra; Exxon Corp. v. Wisconsin Dept. of Revenue*, ____ U.S. ____, 100 S.Ct. 2109 (1980); and *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939).

All of these Supreme Court apportionment cases dealt with the unity of a single corporation; they upheld the apportionment of the entire property, values or income attributable to or arising in connection with the operations of a single unitary corporate entity. The same is true concerning many state income tax cases which have applied the unitary concept in determining the apportionability of income from intangibles.[11]

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[10] This is illustrated by Mobil's ownership of 10% of the stock in ARAMCO. ARAMCO constitutes a source of supply for crude oil for Mobil represented by its 10% ownership of the stock of ARAMCO. It also may be illustrated by Mobil's investments in public utility stock if such investments are made to obtain sources of power for Mobil's petroleum operations.

[11] See, e.g., *International Harvester v. Department of Taxation*, 322 U.S. 435 (1944); *Wisconsin v. J. C. Penney Co.*, 311 U.S. 435 (1940); *Montgomery Ward & Co. v. Commissioner of Taxation*, 276 Minn. 479, 151 N.W.2d 294 (1967); *Great Lakes Pipeline Co. v. Commissioner of Taxation*, 272 Minn. 403, 138 N.W.2d 612 (1965), *app. dism'd* 384 U.S. 718 (1966); *F. W. Woolworth Co. v. Director of Division of Taxation*, 45 N.J.

There is nothing in *Mobil* which conflicts with the holdings in these cases.

Mobil did not distinguish dividends from other income for constitutional purposes. Therefore, the same considerations were applied there to determine the apportionability of dividend income as were applied to determine the apportionability of any other class of income, i.e., whether the income is derived from investments or activities related to the taxpayer's own unitary business.

D. Woolworth has raised no substantial federal question by arguing that the inclusion of "grossed up" dividends entitles it to relief from the UDITPA apportionment formula other than the relief given by the state of New Mexico.

While Woolworth has contended in the proceedings below that the inclusion of dividends in apportionable income entitles it to relief under the provisions of UDITPA, it neither (1) presented to the appellee any specific proposal for relief as

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Footnote 11. cont.

466, 213 A.2d 1 (1965); *Gulf Oil Corp. v. Morrison*, 120 Vt 324, 141 A.2d 671 (1958); *F. W. Woolworth Co. v. Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972); *Sperry & Hutchinson Co. v. Department of Revenue*, 270 Or.329, 527 P.2d 729 (1974); *Appeal of W. J. Voit Rubber Co., May, 1947 C.C.H. Cal Tax Rep. para 202-435; In Re Goodyear Tire & Rubber Co. Corporate Income Tax 1966, 1967, 1968*, 133 Vt. 132, 335 A.2d 310 (1975); *Albany International Corp. v. Halperin*, 388 A.2d 901 (Me. 1978); *Champion International Corp. v. Bureau of Revenue*, 88 N.M. 411, 54 P.2d 1330 (1975); *John Deere Plow Co. v. Franchise Tax Board*, 38 Cal.2d 214, 238 P.2d 569 (1951), *app. dismissed for want of a substantial federal question*, 334 U.S. 939 (9152); *Qualls v. Montgomery Ward*, 266 Ark. 207, 585 S.W.2d 18 (1979); *Montana Department of Revenue v. American Smelting and Refining Co.*, ___ *Mont.* ___, 567 P.2d 901 (1977), *app. dismissed*, 434 U.S. 104 (1978); *W. R. Grace & Co., v. Commissioner of Revenue*, ___ *Mass.* ___, 393 N.E.2d 330 (1979).

provided for under Section 18 of UDITPA [12] nor (2) submitted any facts to establish that the formula, as applied to it by the appellee, produced any unreasonable result or taxed any extra-territorial values or income.

It is therefore clear that, under controlling decisions of this Court, Woolworth is entitled to no apportionment relief in addition to that granted to it by the appellee.

The mere fact that dividends are included in apportionable income and that UDITPA apportions a taxpayer's total apportionable income by reference to a taxpayer's tangible property, payroll and sales does not *per se* invalidate an apportionment formula. Woolworth must still show by clear and cogent evidence that the apportionment formula is invalid. *Butler Bros. v. McColgan*, 315 U.S. 501, 507 (1942); *Norfolk & Western R. Co. v. North Carolina*, 297 U.S. 682, 688 (1936); *Norfolk & Western R. Co. v. Tax Commission*, 390 U.S. 317, 326 (1968).

E. The inclusion of "gross-up" in net income for state income tax purposes does not raise any federal question.

Woolworth's "gross-up" dividend argument is based on the premise that it is entitled constitutionally to exclude from a

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[12] This section reads:

"If the allocation and apportionment provisions of this Article do not fairly represent the extent of the taxpayer's business activity in this State, the taxpayer may petition for or the tax administrator may require, in respect to all or any part of the taxpayer's business activity, if reasonable:

(a) separate accounting;

(b) the exclusion of any one or more of the factors;

(c) the inclusion of one or more additional factors which will fairly represent the taxpayer's business activity in this State; or

(d) the employment of any other method to effectuate an equitable allocation and apportionment of the taxpayer's income.

state's income tax base an amount represented by the "gross-up" because it is improperly included in "net income" in a true economic sense even though it is included in federal taxable income.

At first blush, the "gross-up" issue would appear to present a simple, straightforward question, i.e., whether this particular item can constitutionally be included in a state's tax base prior to apportionment because it finds its way into "federal taxable income" by the application of a legal fiction. However, the question is much deeper than this. This is illustrated by the cases of *Dow Chemical Co. v. Commissioner of Revenue*, 391 N.E.2d 253 (Mass. 1979) and *Caterpillar Tractor Co. v. Lenckos*, ____ Ill. ____, 417 N.E.2d 1343 (1981) where the taxpayers made other elections for federal tax purposes which increased "federal taxable income" or where "federal taxable income" was argued to contain items that were not really net income to the taxpayer. In short, if the states cannot constitutionally rely on "federal taxable income," Pandora's box is open as to what is constitutionally includable *as to a whole host of items* which may find their way into a determination of "federal taxable income" and which may not be justified in any true business or economic sense. Furthermore, "federal taxable income" becomes a meaningless concept for state income tax purposes and those states relying on this tax base would be required to abandon it. In a constitutional sense, then, irrespective of how "gross-up" is characterized, the controlling question is whether a state can constitutionally rely on "federal taxable income" for imposition of state income taxes even though it, an abstract concept, contains elements of income and deductions, which standing alone, may not be rationally justified. Furthermore, such reliance is a two-way sword. For example, New Mexico, by reliance on "federal taxable income," has automatically granted Woolworth an 85% to 100% dividend deduction for its domestic dividends. For aught that appears

in the record, this deduction – justified solely for New Mexico income tax purposes because of its reliance on "federal taxable income" – may well exceed the "gross-up" in question.

In substance, then, this Court is requested to declare invalid all state income tax laws which use "federal taxable income" as a starting point to determine "net income" for state income tax purposes.

However, it is axiomatic that a state has a wide latitude in defining a tax base – net income or otherwise – for state tax purposes.

Based on the foregoing, there is little merit to Woolworth's "gross-up" constitutional argument. This is demonstrated by the fact that no constitutional issue has been raised in other "gross-up" and comparable cases and even here, Woolworth is asking for alternative forms of relief as to this question.

CONCLUSION

For the reasons herein stated, this Court should dismiss the appeal for lack of a substantial federal question or affirm the judgment of the New Mexico Supreme Court.

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CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of May, 1981, I, Sarah E. Bennett, a member of the bar of the Supreme Court, caused to be mailed, postage prepaid, three copies of the foregoing Brief of Amicus Curiae to George W. Beatty and William L. Goldman, Counsel for the Appellant, at 1200 - 18th Street, NW, Washington, D.C. 20036 and to Michael D. Bray, at 919 Third Avenue, New York, New York 10022. I further certify that all parties required to be served have been served.

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